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Petition for certiorari not printed

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH, PETITIONER,

vs.

THE SOUTHERN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH, PETITIONER,

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—9152

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Admiralty

No. 261 of 1938

ANTON MAHNICH

v.

THE SOUTHERN STEAMSHIP CO.

OPINION

Sur Motions to Revise Findings and Award

Before KIRKPATRICK, J.:

This is an action in admiralty for indemnity under the maritime law and for maintenance and cure, brought by a seaman injured at sea in the course of his employment on the respondent's vessel, Wichita Falls. At the close of the trial the Court orally made certain fact findings, and awarded the libellant $700 on his claim for indemnity and $300 for cure and maintenance. The indemnity awarded was for pain and suffering only, all items of loss of wages and loss of earning power being disallowed.

The respondent has filed a petition for reargument, which may be treated as a motion to modify or amend the Court's findings and award. It is directed exclusively to the findings and award in respect of the claim for indemnity, and does not challenge the amount of award for maintenance and cure. The libellant has filed a motion which may be treated as a request to amend the findings by increasing the amount of the award for cure and maintenance.

I have carefully reviewed the testimony, and am now convinced that my finding that the ship was unseaworthy was erroneous, and that the libellant is not entitled to recover anything upon his claim for indemnity. I shall therefore [fol. 2] revise the findings of fact, and now find as follows:

On August 17, 1934, the libellant, then an able seaman on board the Wichita Falls, was instructed to paint the front of the pilot house, using a stage which consisted of a

board weighing about 50 or 60 pounds, rigged from both ends by ropes which ran across the top of the pilot house and were fastened aft. One of the ropes broke at the point where it passed over the edge of the pilot house, and the libellant fell to the deck and sustained an injury to his left foot.

The rope was 1¼ to 1½ inches in diameter, and, had it been sound, it would have been adequate to support the stage together with the two men and the paint pails. There was no fault in the manner in which the stage had been rigged, and the ropes were protected against chafing at the corners of the pilot house by rounded blocks of wood.

The rope had, under the directions of the mate, been cut by the boatswain from a coil of some 1500 feet stored in the Lyle Gun box, intended to be used with the Lyle life-saving apparatus. It had been stored there for slightly over two years, had been new when stored, and had never been used for any purpose. Two lengths of 50 feet were taken from it. The portion thus selected, was, in spite of the examination of it by the boatswain and mate, unquestionably rotten or defective at the point at which it broke. There is no evidence that any of the 1400 feet which remained in the box was bad. In fact the libellant's own testimony was that the length which broke "looked pretty good, almost new; it was a little bit yellow, but the rope was looking good except that part which was stored up." (The word "stored" is a stenographic error. The word used was "tore.") Also, there was other rope on board—a coil of ¾ inch and another [fol. 3] of 2¾ inch rope, the latter being the rope usually used for rigging scaffolds, etc., and being brand new.

Thus the case comes squarely within the rule stated by the Supreme Court in the Pinar del Rio case, 277 U. S. 151; "The record does not support the suggestion that the 'Pinar del Rio' was unseaworthy. The mate selected bad rope when good ones were available." See also the Birkenhead, 51 F. (2d) 116, decided by this Court.

The basis of a seaman's claim for indemnity under the maritime law in a case like this is the unseaworthiness of the ship. The ship will not be presumed to be unseaworthy and the burden is upon him to prove it. He does not meet this burden merely by showing that an instrumentality furnished him was defective, where it also appears that such instrumentality was selected by a ship's officer or another

seaman from a large quantity not shown to be in any way defective or unsuitable.

In the present case the libellant's injury may be traced to the negligence of the mate and boatswain, who, having selected a portion of rope and having failed to observe that it had a rotten spot, furnished it to the plaintiff as part of the equipment for his work

I therefore, now make the finding that the Wichita Falls was not unseaworthy and conclude as a matter of law that the libellant is not entitled to recover anything for indemnity.

The libellant is not entitled to any increase in the award for cure and maintenance. In fact, it might easily have been less, but I understand that the respondent does not challenge it except on the ground of laches.

On the question of laches, I find that the libellant's delay [fol. 4] in bringing this action was excusable, and that it has not been seriously prejudicial to the respondent. All the witnesses to the accident were available and called, the circumstances are really undisputed, and, since the award for cure and maintenance is solely for the period from June 1938 to July 1940, I do not believe that anything is lost by not having the testimony of the physicians who took care of the libellant shortly after his injury. The real question is what was his condition as of 1938-40, and what is his condition now.

The facts relevant to maintenance and cure are as follows: The libellant left the ship on September 4, 1934, at the end of the voyage on which he was injured. He was disabled and received medical attention from that time until December, when he went back upon the ship as an able bodied seaman. For this period of disability his employer has already paid him full wages and an additional $15 for medical expenses, so that it need be given no further consideration.

From December 1935 until May 1936 he continued in the employ of the respondent, as an able seaman, his wages being gradually increased from the $52 he was earning at the time of his injury to $62.50. The work that he did was not the full work of an able bodied seaman, but did involve a large number of duties about the ship which made him a great deal more than a mere pensioner on board.

In May 1936 he voluntarily left the respondent's employment to take a job as a painter for the American Engineering Company at $24 per week.

When he left he was given to understand that he had a [fol. 5] good prospect of reemployment with the line whenever he should apply. Of course he did not wish to jeopardize his chance of a job, and that was the reason he did not bring this action earlier. Considering his situation it seems a good enough excuse to avoid the strict application of the statute of limitations as a basis for the defense of laches.

He held his job with the Engineering Company for about two years. His foot gave him some trouble, but apparently did not substantially interfere with his carrying on his work or impair his earning power, and his leaving was not attributable to the injury. He then went back to the respondent and asked for employment, but found that there was nothing for him.

He was unemployed from June 1938 to July 1940. During this time he made a number of visits to his own physician for medical treatment. In July 1940 he took his present employment as night watchman at $23.50 a week. He has kept it ever since. Obviously his foot, while it may and no doubt does give him some pain and inconvenience, does not interfere seriously with performing his work, since he makes a tour of the plant every half hour, walking about half a mile on each occasion and covering over 182 steps, up and down, in the course of each tour.

The injury produced a certain abnormality in the structure of the bones of his foot. This abnormality is permanent and has been permanent for several years. No doctor has ventured the opinion that his foot can be restored to normal. One thought that diathermy was "worth trying", and it is agreed that the pain and inconvenience from which he suffers at times can be relieved by treatment.

[fol. 6] Upon the foregoing state of facts and having in mind the decision of the Circuit Court of Appeals of this Circuit in the case of Frank B. Loverich v. Warner Company (March 17, 1941), together with the statement of the Supreme Court of the United States in Calmar Steamship Corporation v. Taylor, 303 U. S. 525, that if a disease proves to be incurable, there is no basis for extending cure and maintenance beyond a fair time after the voyage as may be expected to effect such improvement as is possible, I think that the award of $300 for cure and maintenance is ample,

and conclude as a matter of law that the libellant is not entitled to have it increased.

A decree may be submitted.

If separate findings and conclusions are desired, requests may be presented in accordance with this opinion.

[fol. 7] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7928

ANTON MAHNICH, Appellant,

vs.

THE SOUTHERN STEAMSHIP COMPANY

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed July 14, 1942

Before BIGGS, MARIS and GOODRICH, Circuit Judges

Per CURIAM:

The decree of the court below is affirmed upon the opinion of Judge Kirkpatrick.

[File endorsement omitted.]

[fol. 8] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 7928

ANTON MAHNICH, Appellant

v.

THE SOUTHERN STEAMSHIP COMPANY

On Appeal from the Decree of the District Court of the United States for the Eastern District of Pennsylvania

OPINION UPON REHEARING—Filed May 5, 1943

Before Biggs, Maris and Goodrich, Circuit Judges

GOODRICH, Circuit Judge:

The libellant brought an action in admiralty under the general maritime law to recover for indemnity by reason of injuries sustained by an alleged unseaworthy appliance

and for cure and maintenance. We are not presently concerned with the latter cause of action.[1] The injuries com- [fol. 9] plained of were received while libellant was engaged in a painting job upon the ship of which he was a member of the crew. The injuries were received when the rope supporting the stage upon which he was working broke throwing him to the deck below. The rope had been selected for use by the mate of the ship. It was taken from the Lyle gun box and had not theretofore been used. It may be assumed, for the purpose of discussion here, that the failure to detect the weakness of the rope was negligence on the part of the officer who selected it for the purpose used.

The libellant's claim would obviously be an appropriat one for redress under the provisions of the Jones Act[2] were it not for the fact, as his counsel concedes, that the action was begun too late. His claim for recovery, therefore, rests upon the maritime law and the basis for the claim is alleged unseaworthiness (The Osceola, 189 U. S. 159 (1903)) of the vessel because the rope was defective. There was, however, an ample supply of good rope on board the ship at the time of the acts complained.

The respondent contends that the decision in Plamals v. S.S. "Pinar Del Rio," 277 U. S. 151 (1928) settles the question of the libellant's claim adversely to the latter. That case also involved an injury to a seaman which was sustained while he was engaged in working on a paint job. The rope broke, the injured man was hurt when he fell to the deck. There, too, the accident occurred when the mate selected a bad rope and an abundant supply of good rope was on board. The greater part of the discussion by the Supreme Court concerns the question whether in a suit under the Jones Act a libel in rem could be had and this the Supreme Court decided in the negative. The Court also, however, stated that the record did not support the suggestion that the "Pinar Del Rio" was unseaworthy. "The mate selected a bad rope when good ones were available." (p. 155) The libellant says that this was only dictum by [fol. 10] Mr. Justice McReynolds who wrote the opinion of the Court. We think it cannot be so lightly dismissed.

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[1] There has been no request for reargument upon this phase of the case.

[2] 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1940).

The claim that recovery could be had under the general maritime law for injury sustained for lack of seaworthiness of the vessel was fully presented by the appellant in his brief in the Supreme Court, as an inspection of that brief will show. It also appears in the summary of his argument given in the official report of the decision of the Supreme Court (277 U. S. 151, 153). While the opinion, it is true, does not discuss the matter at length we do not think that the authority of the case as a decision on this point can be disregarded by us because the Court, through the writer of the opinion, chose to dispose of the matter in three lines instead of three hundred.

The libellant urges also that this portion of the "Pinar Del Rio" decision is no longer authority after the opinion of the majority of the Court in Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 (1939). The sole question in that case, however, was whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance on the ship instead of a known safe method of doing his work. All of the discussion in the opinion by Mr. Justice Stone is directed to this point. The decision was one under the Jones Act. We do not, as we read the opinion, find even a dictum to support the position of the libellant here.

Our conclusion is, therefore, that this Court was right in its affirmance of the decree of the Court below upon the first hearing. 129 F. (2d) 857 (1942). We have no disposition to narrow the basis of recovery under the maritime law for injuries sustained by the seaman while in the service of the ship. See Jones v. Waterman S.S. Corporation, 130 F. (2d) 797 (C. C. A. 3, 1942), affirmed by the Supreme Court on April 19, 1943, — U. S. —. However, the "Pinar Del Rio" decision seems to be squarely on the point and it is our duty to follow it.

The decree of the District Court is affirmed.

[fol. 11] DISSENTING OPINION

Biggs, Circuit Judge, dissenting:

In the instant case the first officer of the S.S. Wichita Falls caused two pieces of rope to be cut from a 1500 foot length of rope which was in the Lyle-gun box on board the ship

and used them to hang a stage to the bridge of the vessel. The appellant was ordered to get on the stage so that he might scrape and paint the bridge. He had no sooner gotten on the stage when one of the ropes broke, causing him to fall a distance of fifteen feet to the deck. He was injured and brought this suit under the general maritime law (not under the Jones Act) to recover damages.

The conclusion reached by the majority opinion is based upon the words used by Mr. Justice McReynolds in the opinion of the Supreme Court in Plamals v. Pinar Del Rio, 277 U. S. 151, 155, "The mate selected a bad rope when good ones were available."

In Plamals v. Pinar Del Rio, Plamals was being hoisted up the smoke stack of the vessel in a boatswain's chair. A rope broke supporting the chair and he fell to the deck and was injured. The mate of the Pinar Del Rio had selected rope which was visibly old and worn.

There has been much argument in the case at bar as to the nature of the suit which Plamals brought. Actually he set forth two causes of action in his libel; one was based on the general maritime law for indemnity; the other, on the Jones Act. As I have indicated, Plamals' suit was an action *in rem* against the vessel. Mr. Justice Reynolds stated, pp. 154-155, that the "* * * libel alleged that * * * [Plamals] injuries 'were due to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn and not suitable for use' * * * The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." He went on to say, "We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke [fol. 12] of it as based upon that section. The evidence would not support a recovery upon any other ground." The Supreme Court held that Plamals, at his election, was entitled to assert his rights under the general maritime law or under the Jones Act; that it would treat Plamals' libel as asserting his rights under the Jones Act, since he had not stated a good cause of action under the general maritime law, and that a seaman's rights under the Jones Act could not be enforced by a suit *in rem*.

There is a material difference between the facts of the Plamals case and those of the case at bar. In the Plamals

case the mate negligently selected old and worn rope. In the case at bar the first officer carefully inspected the rope used and found it to be in good condition.[1] In the case at bar the duty of the shipowner to supply its ships with good rope and proper appliances was delegated by it to the ship's officers. The respondent's marine superintendent testified that "* * * we always give the officers in charge what they order, so it is reasonable to think that they had the full supply [of rope]."[2] The superintendent did not testify that the S.S. Wichita Falls possessed an adequate supply of good rope. It is settled that the shipowner has an absolute duty to provide safe appliances for the ship for the voyage. In Sabine Towing Company v. Brennan, 72 F. (2nd) 490, 494 cert. den. 293 U. S. 611; The Portland, 213 F. 639; The H. A. Scandrett, 87 F. (2nd) 708. These cases, which represent the great weight of authority, follow the law as laid down by the Supreme Court in The Osceola, 189 U. S. 158, Mr. Justice Brown stated in that case, p. 175, [fol. 13] "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

The S.S. Wichita Falls was engaged in the intercoastal trade and was bound for Houston, Texas, from Philadelphia at the time of the accident. The rope had been in the Lyle gun box for about two years. See note 1 supra. The ship could and presumably did make many such short voyages while the decayed rope remained in the Lyle gun box and

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[1] The first officer testified, "I personally examined the rope—me and the boatswain. We examined the rope; went right through, and we did not see any place where it was bad or showed that it was rotten. By examining, we just twisted it right along." He was asked the question, "That is you turned it counter wise to the way is was twisted?" The first officer answered, "Yes,—right in the middle if you see it hard or dusty, it is rotten. We did not see that." R. p. 221. Nick Geletic, the member of the crew who cut the lengths from the Lyle gun rope at the first officer's direction, stated that the latter said to him, "I see that new line." R. p. 212. As a matter of fact, the rope had been in the Lyle gun box for about two years. R. p. 228.

[2] R. p. 174.

the shipowner had many opportunities to replenish it with sound rope. This, the shipowner failed to do. I think that the first officer had the right to assume that the rope in the Lyle-gun box was sound, for if there be a place where it may be presumed that sound rope will be found, it is in a life-saving device. Moreover, as I have stated, the first officer carefully examined the rope before using it. As a matter of fact, there is evidence that, whatever the first officer's subsequent knowledge may have been, he thought at the time the rope was used that it was new. See the testimony of Geletic, note 1 supra. I think that the first officer was not negligent. If I am correct in this, it follows that there was no negligence on the part of a ship's officer to insulate the shipowner from its absolute duty to maintain safe appliances as in the Plamals case.

My dissent, however, is based on other grounds as well. The decision of the majority of the court in effect holds that the Supreme Court by Mr. Justice McReynolds' single sentence upset the then existing rule of maritime law, a rule which consistently had given effect to the status of seamen as wards of the admiralty. But even if the majority is right in its conclusion as to the Plamals case, I think the effect of that decision has been mitigated by the decision of the Supreme Court in Socony-Vacuum Co. v. Smith, 305 U. S. 424. The cited case arose under the Jones Act case but the defense asserted was assumption of risk by an oiler [fol. 14] who had been injured because he had chosen to stand on a defective step in his ship's engine room when he could have performed his duties in safety from the floor. In passing upon this defense, which in nature is substantially similar to that asserted in the case at bar, the Supreme Court took occasion to pass on the general maritime law and consider defenses under that law as they existed before the passage of the Jones Act. The Supreme Court reiterated the doctrine of the absolute liability of the shipowner to furnish safe appliances.[3] Mr. Justice Stone stated, id., pp. 428-429, "Before the Jones Act a seaman was entitled to recover from a vessel or its owner, indemnity for

[3] The majority of this court do not contend that the Jones Act obliterated the rights of seamen under the general maritime law as it existed at the time of the passage of the Jones Act. Indeed, we held the contrary in Brown v. C. D. Mallory & Co., 122 F. (2nd) 98.

injuries due to an unseaworthy vessel, or for failure to supply and to keep in order proper appliances appurtenant to the ship. The Osceola * * *." It is pertinent to observe that Mr. Justice McReynolds dissented on the ground that assumption of risk was a defense and did not go merely to mitigation of damages.

I conclude that Plamals v. Piñar Del Rio can no longer be considered to be the governing law, if it was ever such, on the point sub judice and for this reason also I think that the judgment should be reversed and the libellant awarded damages.

Indeed, to hold otherwise leaves the seaman in an unenviable position. He is guilty of mutiny if he refuses at the lawful command of his officer to go upon a stage already rigged for him. If he obeys his officer and is thrown to the deck through no fault of his own, he may break his neck for nothing. I think that the anomaly is increased by reason of the fact that if an accident occurs because a plank in a stage breaks and a seaman is injured, he may recover indemnity. It has not been suggested that a shipowner would be relieved of its absolute liability because an officer selected rotten planking for a stage when sound [fol. 15] boards were available. Indeed, the law looks the other way. See Benedict on Admiralty, Sixth Edition, Sec. 83, and the authorities there cited.

A true Copy:

Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 16] Supreme Court of the United States

Order Allowing Certiorari—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

DEC 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH,

Petitioner,

vs.

THE SOUTHERN STEAMSHIP COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

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CONSTITUTION OF THE UNITED STATES.

Article 3, Section 2 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 200

ANTON MAHNICH,

Petitioner,

vs.

THE SOUTHERN STEAMSHIP COMPANY.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 1) was rendered under date of July 10, 1941, and is reported in 45 F. Supp. 839.

The per curiam opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered on July 14, 1942, and is reported in 129 F. (2d) 857 (R. 5).

The opinion of the United States Circuit Court of Appeals for the Third Circuit on rehearing was rendered on May 5, 1943, and is reported in 135 F. (2d) 602 (R. 5).

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Third Circuit, affirming the decree of the District Court is May 5, 1943.

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229 Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347 (a) and under Article 3, Section 2, of the Constitution of the United States.

III.

The Statement of the Case.

This is a seaman's action for personal injuries in admiralty under the general maritime law. The libel alleges two causes of action, one for indemnity damages based on an alleged unseaworthy condition, and the second for maintenance and cure. This petition is not concerned with the latter cause of action. The pertinent facts essential to this proceeding are not in dispute and may be stated as follows:

Petitioner, libellant below, is an American Merchant seaman and was employed by the respondent as an able seaman on its vessel "Wichita Falls" (R. 34). The vessel was engaged in the Coastwise trade between Philadelphia and Houston, Texas, each complete voyage taking about twenty-one or twenty-two days (R. 56).

On August 17, 1934, while the vessel was at sea, petitioner, after standing his wheel watch was assigned to paint the

front of the bridge with another member of the crew. The scaffold upon which he was to work had already been rigged by the boatswain. It consisted of a wooden plank about twenty feet long, one foot wide and two inches thick and weighed approximately fifty or sixty pounds (R. 36, 37). The stage was supported by two ropes, one on either end, extending up the front of the bridge and secured on the back of the pilot house (R. 37, 38). The rope, according to the chief officer was three inches in circumference (R. 220), and according to the boatswain, was a little wider than a quarter and a little less than a half dollar (R. 215).

Petitioner ascended the scaffold and just as he started to paint, one of the ropes holding the scaffold broke, and he fell about fifteen feet to the deck below with resultant serious injuries (R. 39). At that time, the rope, where it had parted, appeared to be decayed (R. 40). The first mate testified that he and the boatswain before rigging the scaffold had examined the rope by twisting it (R. 221). The rope had been in the lyle gun box for over two years and had never been used (R. 228). The lyle gun was used for practice drill every three months, but an old rope was used on those occasions. The lyle gun is used in case of emergency for life saving at sea (R. 221).

This action was commenced over three years after the accident thereby precluding any right of action under the Jones Act (41 Stat. 1007 (1920), 46 U. S. C. A. 688), which presently contains a limitation of three years (formerly two years). The action was therefore brought in Admiralty under the general maritime law, under which there is no statute of limitations, but the rule of laches is applicable. The courts below held that petitioner, under the evidence, was not guilty of laches and decided the case on the merits under the general maritime law.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

First: In holding that the shipowner was not liable in indemnity for an injury due to a defective rope because the mate was negligent in selecting a defective rope when there were other good ropes available.

Second: In failing to hold that a defective rope constituted an unseaworthy condition notwithstanding that there were other good ropes aboard.

Third: In holding that the "Pinar Del Rio" was the controlling authority governing the case at bar.

Fourth: In failing to follow the doctrine laid down in *Socony-Vacuum Oil Co.* v. *Smith*, to the effect that the shipowner was liable for an unsafe appliance even though there is an abundant supply of safe appliances available.

Fifth: In failing to hold that the negligence of the mate in selecting a defective rope to be used by the petitioner was the negligence of the common master.

V.

ARGUMENT.

Summary of Argument.

The undisputed facts show that the mate selected a defective length of rope from a large coil of rope in the lyle gun box. The courts below found as facts that the rope was defective and that the mate was negligent in selecting that defective length of rope from the large coil. On this set of facts petitioner contends that the respondent is liable

under the general maritime law first because it supplied a defective rope notwithstanding there was other good rope available, and second because the negligence of the mate in selecting the bad rope was imputable to the master. In support of the foregoing petitioner makes the following contentions:

(1) The shipowner is charged with an absolute and non-delegable duty to supply and keep in order all the proper appliances appurtenant to the ship.

(2) The shipowner is liable for injury due to a defective appliance notwithstanding that there are other safe appliances available.

(3) The negligence of a fellow seaman in selecting a defective appliance from an abundant supply of suitable appliances does not insulate the shipowner from liability.

FIRST POINT.

The shipowner is charged with an absolute and non-delegable duty to supply and keep in order all the proper appliances appurtenant to the ship.

One of the most oft cited cases relating to the shipowners' duty on this point is the "Osceola", 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, in which this Court laid down the following doctrine (P. 155):

> "That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

In the H. A. Scandrett, 87 F. (2d) 708, the suit was likewise under the general maritime law. The court set forth the

shipowner's duty under that law as unmodified by the Jones Act as follows (P. 710):

> "This is not an action under the Jones Act (41 Stat. 988) founded on negligence. The libelant is invoking a remedy based on unseaworthiness or defective condition of the vessel or her equipment. In such a case the liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute."

(P. 711):

> "In our opinion the libelant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.
>
> "The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. Sec. 190-195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation. Nor does this seem an unduly harsh imposition. A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put. It seems to us that everything is to be said for holding her absolutely liable to her crew for injuries arising from defects in her hull and equipment."

The duty is a continuing as well as a non-delegable one and fastens liability to the shipowner irrespective of negligence. The rule is set forth in *Sabine Towing Co.* v. *Brennan*, 72 F. (2d) 490, as follows (P. 494):

> " 'The duty of shipowners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, responsibility for which they cannot escape by delegating its performance to another. In this respect it is like the common-law duty of a master to provide

his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation.' Christopher *v.* Grueby (C. C. A.) 40 F. (2d) 8, 12.

"*This duty as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses.* Carlisle Pkg. Co. *v.* Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927; The Silvia, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241; Martin *v.* The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. Ed. 65." (Italics ours.)

There is an implied warranty by the shipowner that the vessel and her appliances are seaworthy, The Noddleburn, 28 Fed. 855. In *Work* v. *Leathers*, 97 U. S. 379, 24 L. Ed. 1012, the court held, concerning the owner's duty (L. Ed. p. 1013):

"*If there be defects known or not known he is not excused.* He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. *Such is the implied contract* where the contrary does not appear * * * *If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.*" (Italics ours.)

SECOND POINT.

The shipowner is liable for injury due to a defective appliance notwithstanding that there are other safe appliances available.

Although it is conceded that the appliance in the case at bar was defective, the respondent attempts to avoid his liability by showing that there were other proper appliances aboard which could have served the purpose. The necessary inference from such an argument follows that the shipowner is only obligated to furnish *some* appliances which are safe. To carry this theory to an extreme, a shipowner

in providing ten coils of rope for the vessel would only have to prove that one of those coils was sound and he thereby would relieve himself of liability for any defects in the other coils. This is of course an utterly absurd theory and is entirely inconsistent with the decisions from the earliest times to the present date.

In *J. R. Hanify Co.* v. *Westberg*, 16 F. (2d) 552 (C. C. A. 9), the injury was caused by a defective sling. The cause was tried and decided under the general maritime law. Said the court (P. 553):

> "Where the only appliances suitable for the work are defective—and there is some evidence that the sling which parted was the only one long enough for use in handling the particular load here involved—liability for resulting injury is unescapable. Even where a quantity of appliances are furnished, all presumably suitable for the work, but some of them defective, *the fact that a selection must be made by a fellow servant of an injured workman is unimportant, and the use of one of them which is defective will not shift the responsibility.* Rosseau v. Deschenes, 203 Mass. 261, 89 N. E. 391; Thomas v. Ann Arbor Ry. Co., 114 Mich. 59, 72 N. W. 40. To hold otherwise would be virtually to abrogate the rule that the duty to use due care to furnish safe appliances is non-delegable." (Italics ours.)

In the *Portland*, 213 Fed. 69, the shipowner furnished rope for the construction of slings. The slings were furnished to the men in numbers beyond what was required so that the men had a choice of slings. The sling which was selected proved to be defective and broke, causing an injury. The court held the shipowner liable because of his non-delegable duty to provide proper appliances. Said the court (P. 700):

> "Doubtless the sling is an appliance, and it was incumbent upon the ship to exercise due and reasonable

care and precaution to furnish a safe appliance of the kind. It was furthermore incumbent upon the ship to use like care and precaution to keep the appliance in suitable repair for the use to which it was to be devoted. This includes the duty of making inspections, tests, and examinations at the proper intervals. Union Pacific Ry. Co. *v.* Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

"Nor can this duty be delegated to another so as to escape responsibility for its proper observance and discharge. Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612."

In the *Julia Fowler*, 49 Fed. 277, the court held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover but with diminution of damages because of his negligence in using the unsafe rope.

The choice of an unsafe appliance in Olson *v.* Flavel, 34 Fed. 477, where a safe one was available did not relieve the shipowner of liability but merely mitigated the damages.

In the Navarino, 7 F. (2d) 743, one of the crew selected a defective block from a number of good blocks. The shipowner was held liable for the injury due to the defective block, which defect, said the court, rendered the vessel unseaworthy.

It is thus quite clear that the general maritime law would compel an award for indemnity under the facts at bar. The Circuit Court of Appeals below, however, felt itself bound to follow the statement in the "Pinar Del Rio", which is contrary to the consistent trend of the prior cases. It is therefore essential to carefully analyze that opinion.

The Pinar Del Rio.

The opinion by Mr. Justice McReynolds discloses the following. The plaintiff was a Spanish citizen and was a

member of the crew of the British ship "Pinar Del Rio". While the vessel was in the port of Philadelphia, the plaintiff was hoisted up to paint the smoke stack. The rope broke, causing his fall and injury. The defective rope which caused the accident was selected by the mate from an abundant supply of good rope. Suit was brought *in rem* claiming under Sec. 33 of the Jones Act. The District Court dismissed the action on the ground that the parties were governed by the law of the ship's flag (English). The Circuit Court of Appeals affirmed the judgment of dismissal but on an entirely different ground, namely, that a lien against the vessel is essential to every proceeding *in rem* against her, and that no such lien arose by reason of the Jones Act in favor of the injured seaman. Certiorari was granted by this Honorable Court and as we read the opinion, the only issue which this Court undertook to decide was the finding of the court of appeals that no lien arose from the Jones Act. On page 155, the opinion shows:

> "We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Sec. 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters."

Following the above quotation, is the statement which has precipitated the conflict in the case at bar and which compelled the Circuit Court of Appeals below to depart from the prior settled principles of the Maritime Law. That statement is as follows (P. 155):

> "The record does not support the suggestion that the "Pinar Del Rio" was unseaworthy. The mate selected a bad rope when good ones were available."

There is no discussion or citation of authority in support of this statement and as further evidence that it was not

a decided issue, and did not reflect the opinion of any other than the writer, the next statement reads (P. 155):

> "We must treat the proceeding as one to enforce the liability prescribed by sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based on that section. The evidence would not support a recovery upon any other ground."

The remainder of the opinion is devoted to the question of whether a lien arose from the Jones Act.

If the second quotation be considered as an issue decided by the court, then, as Judge Biggs in his dissenting opinion in the case at bar, stated (P. 605):

> "The decision of the majority of the Court in effect holds that the Supreme Court by Mr. Justice McReynolds' single sentence upset the then existing rule of maritime law."

We suggest that if the court had in fact contemplated that issue, there would have been a complete discussion disposing of the prior law. The more logical view would seem to be that the statement in controversy was only an observation or assumption of the writer and did not reflect the opinion of the court. This view is supported by the last excerpt quoted from that case. There, it is specifically stated that the court was considering the problem only from the standpoint of the applicability of the Jones Act to the suit *in rem*. The utter lack of discussion or citation of authority, especially in view of the great weight of authority to the contrary clearly indicates that the court did not undertake the consideration or disposition of that problem.

The strongest evidence that this Court did not intend the controverted statement as a part of its decision, is the opinion of this Court in *Socony-Vacuum Oil Co.* v. *Smith*,

supra. Even if the Pinar Del Rio be construed to be in point, the *Socony* case would necessarily overrule it. It may be noted that Justice McReynolds dissented from the remainder of the court in the *Socony* case.

Socony-Vacuum Oil Co. v. Smith.

The suit there was by a seaman to recover for injuries due to his use of a defective appliance instead of a safe one which was available. The suit was brought under the Jones Act and one of the defenses was assumption of risk. In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence. It refused the defendant's request for an instruction that if the seaman could have performed his duty without the use of the defective appliance, he assumed the risk of injury from it; instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance. Judgment of the District Court, upon a verdict in the seaman's favor was affirmed by the Court of Appeals. Certiorari was granted by this Court, and the judgment was affirmed. Since the suit sought the benefits of the Jones Act it was contended that the defense of assumption of risk was available because that act did not abolish that defense. This Court considered the case as brought under the maritime law before the Jones Act for the answer to the problem. Said the court (P. 428):

> "• • • the Jones Act, in extending to seamen all the rights to recover for injuries resulting from defective appliances given to railway employees • • • had left undisturbed the admiralty rule with respect to assumption of risk."

We make note of this point because the court below held that the *Socony* case was under the Jones Act and therefore not applicable. It is clear that if the sole remedy were

under the railway acts the defense may have been available. However since the Jones Act was a cumulative remedy and not an alternative one the court went back of the Jones Act to the maritime law, which law governs the case at bar.

The court below also stated that the *Socony* case involved the doctrine of assumption of risk and therefore furnished no analogy to the case at bar. We respectfully submit that the learned court below erred in this conclusion. The defense of assumption of risk is an affirmative defense which is brought into play only after a party is conceded to be liable. In other words, if the facts do not show liability then there would be no need for a defendant to plead any other defense. It is only where a defendant has been shown to be derelict in his duty, then, under certain circumstances he may attempt to exonerate himself by showing that the plaintiff had assumed the risk of the danger. In the *Socony* case the court necessarily had to decide first of all whether the shipowner was liable under the admiralty law for a defective appliance where good ones were available and then to determine whether under the same law, the seaman was bound by the assumption of risk rule. The court was therefore required to specifically answer the problem involved at bar before undertaking the question of assumption of risk. We believe that this factor was overlooked by the court below.

Proceeding with the analysis of the *Socony* case, the court first states the shipowner's duty under the maritime law as follows (P. 428):

> "Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship.'"

Although the seaman himself selected the defective appliance in that case, the court then goes on to say that even

under those circumstances he does not assume the risk of the defective appliance, but the seaman's own negligence called for the application of the comparative negligence rule. In summing up the court stated (P. 430):

> "In the absence of any controlling or persuasive authority to look to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate limits. Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed."

(P. 431):

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

With this background the court then considers the added element of the availability of a safe appliance where a defective one has been selected (P. 431):

> "There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner."

Then, significantly, the court makes the finding which covers the situation at bar (P. 432):

"In either case the seaman's negligence is a contributing cause of his injury, *without which the shipowner would be liable to the full extent of the damage.*"

In other words, if the element of the seaman's own negligence be removed, we have the situation involving both the safe as well as defective appliance with full liability on the shipowner's part. In the case at bar the seaman had nothing to do with the selection of the rope or the rigging of the scaffold. Under these circumstances the shipowner is fully liable without having the benefit of the comparative negligence rule.

The court then concludes by holding that assumption of risk is not a defense under the maritime law and considers the old cases which are peculiarly applicable to the facts at bar (P. 432):

"The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in Olson *v.* Flavel (D. C.) 13 Sawy. 232, 34 F. 477, supra, and The Julia Fowler (D. C.) 49 F. 277, supra, where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper basis for a substantial reduction of damages because of the negligence of the choice. In The Julia Fowler, supra, the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an

exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available."

Although the defense of assumption of risk has not been raised as such, yet the effect of respondent's position is the same. The *Socony* case makes it quite clear in any event that the shipowner is absolutely liable as under the prior maritime law, for any injury due to a defective appliance. This liability cannot be cancelled although it may be lessened where the seaman himself has contributed to the injury. Since petitioner did not in any way contribute to the accident the shipowner, as Mr. Chief Justice Stone stated in the *Socony* case, is "liable to the full extent of the damage".

We earnestly submit that the "Pinar Del Rio", was not intended to overrule the prior maritime law, as is clearly indicated in the *Socony* case, which reviews with approval the authorities under that law. In any event the *Socony* case contains the latest expression on the point and if in fact there is any conflict then the decision in the *Socony* case must prevail.

THIRD POINT.

The negligence of a fellow seaman in selecting a defective appliance from an abundant supply of suitable appliances does not insulate the shipowner from liability.

We have heretofore discussed the problem at bar from the standpoint of whether the shipowner could be absolved because there were other safe appliances which could have been used instead of the defective one. The finding of the court below and the much referred to statement of Mr.

Justice McReynolds that the shipowner was not liable because the mate was negligent in selecting a bad rope when good ones were available, may give rise to the conclusion that the shipowner was insulated from liability by the mate's negligence. This is of course an unsound conclusion because the shipowner is absolutely liable for any defective appliance and this liability cannot be avoided but is only subject to be diminished if the injured man himself was contributorily negligent. However, even if such were not the rule the Master would not be relieved because of the mate's negligence but on the contrary, under the facts at bar, it would be an additional factor fastening liability on the shipowner. Under the common law, and under the general maritime law before the Jones Act, the fellow-servants rule was a valid defense. But there were well defined exceptions to this rule, most important among which is one where a servant is required or authorized by his employment to furnish or provide suitable material for the work in which his fellow servants are engaged. The general rule and the exception were considered at length by Mr. Justice Harlan in *Hough* v. *Texas and Pacific R. R. Co.*, 100 U. S. 213, 25 L. Ed. 612, as follows (L. Ed. P. 614):

> "'The general rule,' said Chief Justice Shaw, in Farwell *v.* R. Co., 4 Met., 49, 'resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and, in legal contemplation, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and

provided for in the rate of compensation as any other.' "

Coming to the exception the court said (L. Ed. P. 615):

"* * *, there are well defined exceptions, which, resting as they clearly do upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

"One and, perhaps, the most important of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first

instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

* * * * * * *

"A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the Company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employes, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation."

It is clear therefore that even under the common law the master is not immune from liability because of a fellow servant's negligence, in proving a defective appliance. Much less can the shipowner avoid liability under the maritime law where the duty is not only non-delegable but is an absolute one.

In the Noddleburn, 28 Fed. 855, a defective rope caused the seaman's fall and injury. In replying to the defense of the fellow servants rule the court held (P. 858):

"'where a servant is authorized and required by his employment to furnish or provide suitable material

or appliances for the work in which his fellow-servants are engaged, whether under his special direction or otherwise, and one of them is injured by reason of his neglect or omission in either of these respects, the common master or employer is responsible in either case.' Gilmore *v.* Northern Pac. Ry. Co., 9 Sawy. 563; S. C. 18 Fed. Rep. 869; Hough *v.* Railway Co., 100 U. S. 213; Chicago, M. & St. P. Ry. Co. *v.* Ross, 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184; Northern Pac. Ry. Co. *v.* Herbert, 116 U. S. 647; S. C. 6 Sup. Ct. Rep. 590."

In the Portland, *supra;* on this point the Court stated (P. 700):

"The second mate testifies that he had certain of the crew make up new slings while on the voyage to this port, and that he himself inspected the slings, both the new and those that had been used, and believed all to be safe for use. In this duty in making up the slings and of inspection, he acted in the stead of the ship, and was therefore vice principal, and the question is resolved into one whether he observed due and reasonable care in the discharge of this duty."

In the Julia Fowler, *supra,* (cited with approval in the Socony case), the seaman was injured by a defective rope negligently selected by the mate from a supply of good rope. In holding the shipowner liable for the negligence of the mate, the Court said (P. 278):

"It is plain that the mate was negligent in the performance of his duties in the use of such a line to rig the triangle in that manner. He ordered the use of this particular rope, and superintended the rigging of it. The defect in the line was manifest upon inspection, as it was spliced, and whipped for smooth running. The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of rigging or methods plainly unsafe, affects both ship and owners with liability for the consequent damage. The chief

officer was not acting in the mere capacity of a fellow-laborer, as in Quinn *v.* Lighterage Co., 23 Fed. Rep. 363; The Queen, 40 Fed. Rep. 694, 697; Hedley *v.* Pinkney, (1892) 1 Q. B. 58. The case is substantially the same as that of the A. Heaton, 43 Fed. Rep. 592, in which this rule was applied in respect to the use of a rotten gasket. See, also, The Frank and Willie, 45 Fed. Rep. 494. The libelant had nothing to do with preparing or rigging the triangle; but when it was ready he was ordered aloft to work upon it, and obeyed."

It is one of the most settled principles in the maritime law that this duty to provide and maintain safe and seaworthy appliances is one which the master cannot delegate to anyone. That duty is imposed upon him as an absolute and non-delegable one. H. A. Scandrett, *supra; Sabine Towing Co.* v. *Brennan, supra;* The Seeandbee, 102 F. (2d) 577; *Socony Vacuum Oil Co.* v. *Smith, supra.*

It seems crystal clear therefore that the negligence of the mate cannot operate to insulate the shipowner from liability but must be considered as an additional ground of liability.

The defective rope in the case at bar was taken from the coil of rope in the lyle gun box. As Judge Biggs said in his dissenting opinion, if there is any place where it may be presumed that sound rope will be found, it is in a life-saving device. The rope lay in the lyle gun box, unused, for at least two years. The vessel made a complete voyage every twenty-one or twenty-two days. By simple calculation the vessl made at least thirty-three complete voyages without this particular rope being used. In fact an old used rope was employed for practice drills with the lyle gun.

Conclusion.

The courts below found as a fact that the rope was defective and respondent has not attempted to deny that fact.

As has been stated from the case of *Work* v. *Leathers, supra*, the shipowner is not excused for known or unknown defects and if a defect develops without apparent cause it is to be presumed that it existed when the service began. Clearly, the respondent here violated its duty at the outset of every one of the thirty-three voyages by failing to supply rope which was sound and adequate. The duty was violated also in maintaining the rope in a defective condition in the lyle box. Nor could the respondent delegate its duty to the mate to supply the petitioner with a safe rope to hold the scafffford upon which he was ordered to ascend. We submit that the respondent is liable to the full extent on any one of these counts.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 7928. 200

ANTON MAHNICH,

Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States.

No. 7928. October Term, 1942.

ANTON MAHNICH,
Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This is a suit in personam in admiralty under the general maritime law for injuries sustained due to the use of a defective rope which petitioner alleges as unseaworthiness of the vessel. The petitioner's claim, as his counsel concedes, is not one for redress under the Jones Act because that action has been barred by lapse of time.

The facts are substantially as set forth in petitioner's brief, but for clarity the case arises from the following circumstances: the petitioner was a seaman and was engaged in washing down the paint on the bridge while the vessel was at sea. He was doing this work on a staging which had been rigged up at the order of the mate. One of the ropes holding the staging broke causing the staging to fall and the petitioner to fall to the deck. The rope was defective. It was selected for use by the mate after he had inspected it. The rope appeared to him to be in good condition. There was an abundant supply of other rope on board which was not defective and which could have been used for the same purpose.

ARGUMENT.

The respondent contends that this practically identical case has been before your Honorable Court in *Plamals v. SS Pinar Del Rio*, 277 U. S. 151 (1928), and that the question was there decided in favor of the respondent. The Circuit Court of Appeals for the Third Circuit in its decision by Judge Goodrich states that "the Pinar Del Rio decision seems to be squarely on the point and it seems to be our duty to follow it."

The *Pinar Del Rio* case involved an injury to a seaman while he was engaged on working on a paint job. The rope broke, the injured man was hurt when he fell to the deck. There too the accident occurred when the mate selected bad rope when an abundant supply of good rope was on board. Your Honorable Court in that case stated that "the record did not support the suggestion that the Pinar Del Rio was unseaworthy. The mate selected a bad rope when good ones were available" (p. 155). The petitioner claims that this was only dictum by Mr. Justice McReynolds who wrote the opinion of the court, but as the Circuit Court of Appeals in its opinion stated "we think it cannot be so lightly dismissed." Examination of the petition for writ of certiorari and the brief filed in your Honorable Court on behalf of the injured seaman, the libellant, discloses Point V therein was that "under general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order proper appliances including the proper bos'n's chain, proper gantline, properly rigged for the seaworthiness of the vessel in this respect" and cited two cases, *Julia Fowler*,

49 Fed. 277, and *Johnson & Co. v. Johansen*, 86 Fed. 886, cert. den. 170 U. S. 706. In the respondent's brief in reply to Point V, the respondent stated that the question was not one of unseaworthiness and furthermore pointed out that the *Julia Fowler* and the *Johnson & Co. v. Johansen* cases had been overruled by *The Osceola*, 189 U. S. 159. Hence there can be no doubt that the very question raised here was before your Honorable Court in the *Pinar Del Rio* case.

Petitioner states on page 6 of his brief in the present case that the decision of the Circuit Court of Appeals is in direct conflict with the trend of decisions under the maritime law and cites certain cases. Examination of those cases do not sustain petitioner's contention. We shall merely call attention to *The Noddleburn*, 28 Fed. 855, and *The Portland*, 213 Fed. 699, and the same holds true of the other cases cited.

In *The Noddleburn*, 28 Fed. 855, the seaman was injured when a crane line broke, causing him to fall. Prior to the accident the mate had been informed that the crane line was insufficient and had ordered it repaired, but his order was countermanded by the master. The crane line in question was part of the rigging of the foremast backstay and the after foremast shroud.

This case involved not a choice of supplies to be used in performing some work to be done, but in the master permitting the crane line which was a part of the ship's rigging to remain in an unsecure condition.

The discussion by the court in *The Osceola* of this case would indicate that it did not consider that liability in *The Noddleburn* was founded upon a mere negligent act.

In *The Portland*, 213 Fed. 699, the suit was by a stevedore, not a seaman. He was injured by reason of the fact

that the rope slings which had been made up on the vessel from bales of rope under the direction of the mate whose duty it was to inspect the slings and to determine their strength and fitness for use. The stevedores were furnished a larger number of slings than they actually required for use and to that extent had a limited choice as to the ones which would be used.

That case is not controlling here as there was not the relation of master and servant as between the owner and stevedore, and the general rule is that the former would be liable to the latter, a business invitee, for any negligence of any type that caused his injury.

We admit that there is a duty upon the shipowner at the commencement of the voyage to make the vessel seaworthy and that was done in the case of the vessel here involved, namely, *The Wichita Falls.* The trial judge held: "That the Wichita Falls was not unseaworthy." 45 F. Supp. 839, 840. This finding was not altered by the Circuit Court of Appeals.

The basis of a seaman's claim for indemnity under the maritime law in a case like this is the unseaworthiness of the vessel. The burden is upon him to prove it. He does not meet this burden merely by showing that a supply, namely rope, furnished him was defective where it also appears that such supply was selected by a ship's officer or other seaman from a large quantity not shown to be in any way defective or unsuitable.

The direct cause of the petitioner's injury was the use of defective rope by the mate. The fact that he used this particular rope when he could have used other rope that was not defective was the result of the exercise of

his judgment in the ordinary management and operation of the ship.

The mere operating negligence even of one in authority does not create responsibility. *Chelentis v. Luckenbach SS Co.*, 247 U. S. 372, 384.

The respondent contends that its duty was fulfilled when at the commencement of the voyage the vessel was supplied with adequate rope, concerning which there is no dispute.

The respondent further is of the opinion that there is and should be a difference between what may be considered as part of the ship's rigging and gear and, as in the present case, merely rope which is considered part of ship's supplies.

The petitioner further contends that, if *Plamals v. SS Pinar Del Rio* was law, it was overruled by the case of the *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939). In that case the sole question was whether assumption of risk is a defense in a suit by a seaman under the Jones Act to recover for injuries resulting from his use while on duty of a defective appliance instead of a known safe method of doing his work. The Circuit Court of Appeals held that "the opinion of Mr. Justice Stone is directed to this point. The decision was one under the Jones Act and as we read the act we do not even find a dictum to support the position of the libellant here." There was no mention in any of the briefs filed before your Honorable Court in that case of the *Plamals v. SS Pinar Del Rio* case, and it is fair to assume that it played no part in your decision and was not even considered, nor do we conceive of any reason why it should have been since the two cases involved distinct and separate problems.

It is our understanding that *Plamals v. SS Pinar Del Rio* is still the law. It is a sound decision and it should not be overruled.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH W. HENDERSON,
Counsel for The Southern Steamship Company.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 200.

ANTON MAHNICH,

Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENT.

JOSEPH W. HENDERSON,
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IN THE

Supreme Court of the United States.

No. 200. OCTOBER TERM, 1943.

ANTON MAHNICH,
Petitioner,

v.

THE SOUTHERN STEAMSHIP COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R.* 242, PR. 1) is reported in 45 F. Supp. 839.

The opinion of the United States Circuit Court of Appeals for the Third Circuit after first argument (PR. 5) is reported in 129 F. (2d) 857.

The opinion of the United States Circuit Court of Appeals for the Third Circuit after reargument (PR. 5) is reported in 135 F. (2d) 602.

*References to the typewritten record shall be designated "R" followed by the page number of the typewritten record and references to the printed record shall be designated "PR" followed by the page numbers of the printed record.

STATEMENT OF THE CASE.

The petitioner filed a libel against the respondent, alleging two causes of action; (1) for damages as a result of injuries caused by the negligence of respondent, and (2) for maintenance and cure. (R. 1-6.)

The respondent filed Exceptions and Exceptive Allegations to the Libel contending that if the Libel was intended to state a cause of action under the Jones Act (41 Stat. 1007, 46 U. S. C. A. 688) it was barred by limitation, and if it was intended to state a cause of action under the general maritime law, the libellant was guilty of laches. (R. 7-13.) The petitioner filed an Answer to the Exceptive Allegations. (R. 14-17.)

After argument on the Exceptions, the libellant filed a withdrawal of all references to the Jones Act, and based his suit solely on rights afforded by the general maritime law. (R. 18.)

The libellant thereafter filed an Amended Libel alleging that the accident and the resultant injuries were due to the unseaworthiness of the vessel and carelessness of the respondent for which he was entitled to (1) indemnity, and (2) maintenance and cure. (R. 20-24.) Answer was filed by the respondent (R. 25-28), and the case was heard by the Honorable William H. Kirkpatrick at which time testimony was adduced showing the following facts.

The petitioner is an American merchant seaman who was employed by respondent as an able seaman on its vessel *Wichita Falls*, which vessel was engaged in the coastwise trade between Philadelphia and Houston. (R. 34, 56.)

On August 17, 1934, while the vessel was at sea, petitioner, after standing his wheel watch, was assigned (with another member of the crew) to paint the front of the

bridge. The scaffold upon which he was to work had already been rigged by the boatswain. The stage consisted of a wooden plank about twenty feet long, one foot wide and two inches thick and weighed approximately fifty or sixty pounds. (R. 36, 37.) The stage was supported by two manila ropes, one on either end, extending up the front of the bridge and secured on the back of the pilot house. (R. 37, 38.) The rope, according to the chief officer, was three inches in circumference (R. 220), and, according to the boatswain, was a little wider than a twenty-five cent piece and a little less than a half dollar. (R. 215.)

Petitioner got on the scaffold, the ropes of which looked safe to him (R. 69), and, just as he started to paint, one of the ropes holding the staging broke, and he fell about fifteen feet to the deck below with resultant serious injuries. (R. 39.) Immediately after the accident, the rope appeared to petitioner to be decayed where it had parted (R. 40, 68) but, except where torn, it looked like good new rope. (R. 40.) The first mate testified that he and the boatswain, before rigging the scaffold, had examined the rope right through and did not see any place where it was bad or showed that it was rotten. (R. 221.) The boatswain and first mate tested the rope by twisting it counterwise. (R. 221.) The rope was cut from a coil of new rope fifteen hundred feet long, which had been in the lyle gun box for over two years and had never been used. (R. 228.) The coil of fifteen hundred feet, after having been cut, was then replaced by a brand new rope. (R. 221.) The lyle gun was used for practice drill every three months, but an old rope was used on those occasions. (R. 228.) The lyle gun is used in case of emergency for life saving at sea. (R. 221.) The mate also

testified that there was aboard the vessel a coil of probably three-quarter inch rope and another coil of two and three-quarter inch rope (R. 222), the latter of which coils was new and used for rigging scaffolds, etc. (R. 222.)

The Trial Judge, although he held that petitioner was not guilty of laches, found, in addition to the above facts, that the rope which was used, if it had been sound, would have been adequate (R. 243, PR. 2) and that neither the coil nor the extra rope on board was shown to be defective or unsuitable (R. 244, PR. 2) and, therefore, held that the *Wichita Falls* was not unseaworthy, dismissing the cause of action for indemnity. (R. 244, 245, 248, PR. 1-5.) The decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Third Circuit, after reargument, on the opinion of Circuit Judge Goodrich, Circuit Judge Biggs dissenting. (PR. 5-11.)

The United States Circuit Court of Appeals for the Third Circuit, in affirming the decree of the District Court, found that the accident to petitioner was due to the negligence of the Chief Officer of the *SS. Wichita Falls* in failing to detect a weakness of the rope which was used to support the staging upon which the petitioner was working while painting the ship. (PR. 6.) That Court further found that the rope which was taken from the Lyle gun box had not theretofore been used; also that there was an ample supply of good rope on board the ship at the time of the acts complained; and that therefore no unseaworthiness of the ship was proved. (PR. 6.)

The United States Circuit Court of Appeals for the Third Circuit held on the authority of *Plamals v. Pinar del Rio*, 277 U. S. 151 (1928), that under the general maritime law of the United States there could be no recovery for the

negligence of the mate in selecting a defective rope from an ample supply of good rope as such act by the mate did not establish unseaworthiness of a ship so as to entitle an injured seaman to indemnity under the maritime law. Accordingly, the Court-below affirmed the decree of the Trial Court awarding indemnity in part only for maintenance and cure and not for unseaworthiness.

ARGUMENT.

A Vessel Which Contains on Board an Ample Supply of Good Rope Is Not Unseaworthy so as to Permit a Seaman to Recover Indemnity From the Vessel and Her Owner for Injuries Incurred as the Result of the Use During the Voyage of a New But Defective Rope Selected by the Mate After Due Inspection.

This identical question has already been decided by Your Honorable Court in *Plamals v. SS. Pinar Del Rio*, 277 U. S. 151 (1928). It is still the law, is a sound decision, and should not be overruled.

In *The Pinar Del Rio* the seaman, like the petitioner herein, was injured when working on a paint job. While he was in a boatswain's chair painting the funnel, the rope broke causing him to fall to the deck. In that case, like the present, the accident occurred because the mate had selected and used a bad rope when an abundant supply of good rope was on board. Your Honorable Court held, speaking through Mr. Justice McReynolds, that:

> "The accident resulted from the negligence of the mate who selected a defective rope. An abundant supply of good rope was on board." (Page 154.)
>
> . . . . .
>
> "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." (Page 155.)

The petitioner herein contends that the aforesaid statement was merely dictum and "not a decided issue, and did not reflect the opinion of any other than the writer" and further, somewhat in the nature of a plea of confession

and avoidance, that, even if it was the law, it was overruled by the subsequent case of *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939).

The petitioner is in error in both contentions.

A. The Pinar Del Rio.

While the greater part of the decision in *The Pinar Del Rio* concerns the question whether a cause of action under the Jones Act is a lien against the ship which can be enforced in admiralty by a libel in rem, other questions were presented and considered by Your Honorable Court.

An examination of the briefs will show that the precise question now on review was raised by the petitioner therein, and answered by the respondent therein, in Point V of the Brief of Petitioner on the Writ of Certiorari, and in Point IV of Respondent's Brief on the Writ of Certiorari.

The aforesaid Point V of petitioner's brief in *The Pinar Del Rio*, reads as follows:

"Point V.

"Under the general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order proper appliances, including a proper bos'n's chair and proper gantline, properly rigged, and for the unseaworthiness of the vessel in this respect."

The aforesaid Point IV of respondent's brief in *The Pinar Del Rio* reads as follows:

"Point IV.

"Even if American law as laid down by this court in 'The Osceola', 189 U. S. 158, is applicable to this case, petitioner failed to make out any cause of action be-

cause the accident was due to the negligence of a fellow servant."

Moreover, the petitioner in *The Pinar Del Rio* not only raised under said Point V the precise question now on review but as authority for that proposition cited in his brief in support of petition for certiorari and in his brief on certiorari many of the same cases which the petitioner herein now cites in his brief, to wit, *The Osceola*, 189 U. S. 158 (1903); *The Noddleburn*, 28 Fed. 855 (D. C. Ore. 1886); *The Julia Fowler*, 49 Fed. 277 (D. C. S. D. N. Y. 1892), and *The Navarino*, 7 F. (2d) 743 (D. C. E. D. N. Y. 1925).

That Your Honorable Court fully considered this identical question in *The Pinar Del Rio* is further evidenced by the summaries of the argument for petitioner and the argument for respondent appearing on page 153 of 277 U. S., where the petitioner is reported as having contended:

> "Under the general maritime law, independent of the Jones Act, libellant was entitled to recover for respondent's failure to supply and keep in order, proper appliances, including a proper bos'n's chair and proper gantline, properly rigged, and for the unseaworthiness of the vessel in this respect."

and where the respondent is reported as having contended:

> "Even if American law as laid down by this Court in *The Osceola*, 189 U. S. 158, is applicable to this case, petitioner failed to make out any cause of action because the accident was due to the negligence of a fellow servant."

As stated by Judge Goodrich in the Court-below, "the 'Pinar Del Rio' decision seems to be squarely on the point". (PR. 7.) Moreover, it is of no legal significance that Mr. Justice McReynolds decided this question in such a succinct manner rather than in an elaborate lengthy dissertation As also expressed by Judge Goodrich:

"While the opinion, it is true, does not discuss the matter at length we do not think that the authority of the case as a decision on this point can be disregarded by us because the Court, through the writer of the opinion, chose to dispose of the matter in three lines instead of three hundred." (PR. 7.)

We submit that the decision in *The Pinar Del Rio* has settled the question herein raised.

General Maritime Law.

It is conceded that the shipowner is under a duty at the commencement of the voyage to make the vessel seaworthy, and that he is liable for the breach of that duty without regard to negligence. However, in this case there is no proof by the petitioner that at the commencement of the voyage the vessel was unseaworthy.

The respondent's duty was fulfilled when at the commencement of the voyage the vessel had an ample supply of good rope on board, and both the Trial Court and the Circuit Court of Appeals found that as a fact: (PT. 2, 3, 6.)

Notwithstanding petitioner's contention, with which we do not agree, that "the trend of the prior cases" was otherwise, the following decisions both prior and subsequent to *The Pinar Del Rio* show that the general maritime law does not give the petitioner the redress which he seeks herein but which he might have obtained under the Jones Act, if he had acted promptly.

In *Roebling's Sons Co. of New York v. Erickson*, 261 Fed. 986 (C. C. A. 2nd, 1919), in which your Honorable Court denied certiorari in 252 U. S. 585 (1920), it was contended that the vessel was unseaworthy by reason of the

fact that the master directed the discharging of cargo in a dangerous manner departing from a previous safe method. The master directed the seamen to put a stick under the end of logs to hold them while the tackle was being disengaged. The stick, which was an ordinary piece of dunnage, was defective. The court held that the adoption of a dangerous method of discharging the cargo by the master was an improvident order, amounting to negligence, and that the use of the dunnage for a purpose for which it was not intended did not constitute unseaworthiness.

In that case the instrumentality or "appliance" which was chosen was not adapted to or fit for the use to which it was put.

The court said:

> "There would, however, be little security for careful owners if, after furnishing a seaworthy ship and proper appliances, they were still liable for the act of the master in not using the proper appliances furnished, or in using them for purposes for which they were not furnished." (Page 988.)

In *The Petroline*, 271 Fed. 273 (C. C. A. 2nd, 1921) the seaman sought indemnity because of the unseaworthiness of the vessel in not providing a hatch cover with proper braces. He claimed that in opening the hatch cover so as to afford air to the hold below the stick or block of wood used to hold up the hatch, which fell on his hand, was worn, defective and inadequate. While the Court held that libellant had not shown "that a defective block was used which brought about the happening of the accident", it further stated on page 276:

> "It also appears that, if there was a worn, defective block, there were others available for use, and the

master, therefore, did not provide a ship which was unseaworthy. Hanrahan v. Pacific Transport Co. (C. C. A.) 262 Fed. 951."

In *The Birkenhead*, 51 F. (2d) 116 (D. C. E. D. Pa. 1930) the seaman was injured while using a monkey wrench to tighten a nut. While so doing, the wrench, which was defective, slipped, and he fell. The court found as a fact that there were numerous wrenches of all kinds on board, which were available for use, and, therefore, held that the vessel was seaworthy.

In *The James E. Ferris*, 1 F. Supp. 1018 (D. C. W. D. N. Y. 1932) a seaman injured his back and claimed indemnity because of unseaworthiness. At the time of the injury a cable, which had been put out to the dock, was being returned to the ship. A heaving line attached to the end of the cable which was being drawn up caught on the lip of the chock and parted. The libellant was caused to fall backwards and sustained severe injuries. The libellant attempted to prove the ship did not have a sufficient supply of heaving lines, but the evidence showed an ample supply of good rope. Furthermore, like the instant case, prior to its use, the line, which was new, had been inspected by the master. Indemnity was denied on the authority of *The Pinar Del Rio*.

Petitioner's Cases.

The cases cited by petitioner are readily distinguishable and do not support the proposition that the shipowner is liable for injury due to defective supplies, such as the rope in question, when an ample amount of good supplies was available.

J. R. Hanify Co. v. Westberg, 16 F. (2d) 552 (C. C. A. 9th, 1926) was a suit by a longshoreman, not a seaman,

against his employer for furnishing a sling of insufficient strength in the loading of defendant's schooner. While the Court stated the case was decided as a "proceeding in maritime tort", there was no discussion as to seaworthiness of the vessel as herein presented but merely the short quoted paragraph as to the effect of the selection of a defective appliance by a fellow servant.

In *The Portland*, 213 Fed. 699 (D. C. Ore. 1914), the suit was by a stevedore, not a seaman. He was injured by reason of the fact that the rope parted in a sling which had been made up on the vessel from bales of rope under the direction of the mate whose duty it was to inspect the slings and to determine their strength and fitness for use. The stevedores were furnished a larger number of slings than they actually required for use and to that extent had a limited choice as to the ones which would be used.

That case is not controlling here as there was not the relation of master and servant as between the owner and stevedore, and the general rule is that the former would be liable to the latter, a business invitee, for *any negligence of any type* that caused his injury.

As heretofore stated *The Julia Fowler*, *supra* and *The Navarino*, *supra*, were cited in the briefs in *The Pinar Del Rio* but not by Your Honorable Court in that case. *The Julia Fowler*, *supra*, involved the use of a halliard which was *known* to be defective, and there was no finding by the court that ample sound rope was available, although reference was made in the opinion to proper rope and readjustments. Again the question of seaworthiness as here involved was not presented. *The Navarino*, *supra*, is likewise inapplicable because it involved a defective block which by its own nature was an appliance.

In *The Noddleburn, supra*, the seaman was injured when a crane line broke, causing him to fall. Prior to the accident the mate had been informed that the crane line was insufficient and had ordered it repaired, but his order was countermanded by the master. The crane line in question was part of the rigging of the foremast back-stay and the after foremast shroud. This case involved not a choice of supplies to be used in performing some work to be done, but in the master permitting the crane line which was a part of the *ship's rigging* to remain in an unsecure condition. The discussion by the court in *The Osceola* would indicate that it did not consider that liability in *The Noddleburn* was founded upon a mere negligent act.

In *Olson v. Flavel*, 34 Fed. 477 (D. C. Ore. 1888), the appliance was not defective but for purposes of loading coal the master who knew of the difficulties should have either used a wider gangplank or used an iron chute on the dock.

The Phrase "Appliances Appurtenant to the Ship" Does Not Include All Consumable Supplies.

While the rights of seamen under general maritime law as defined in *The Osceola*, 189 U. S. 158, 175 (1903) include, *inter alia*,

> "2. That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship: *Scarff v. Metcalf*, 107 N. Y. 211."

we do believe that the words "the proper appliances appurtenant to the ship" means everything about a ship. If so, then the owner would be absolutely liable when an injury

was caused by the breaking of anything. This would make him an insurer of his crew.

In *The Henry B. Fiske*, 141 Fed. 188, 190 (D. C. Mass., 1905), the court said:

> "As regards the crew employed on board a vessel, there is no warranty on her part that none of her fittings or appliances shall at any time give way, to their injury."

The cases indicate that no such onerous duty lays upon a shipowner. If such were the case, there would have been no occasion for the progressive remedial legislation which has been enacted for the benefit of seamen. The Jones Act, which is most liberal, does not impose so heavy an obligation. The seamen under that Act must at least prove some fact from which an inference of negligence may be raised.

We are not concerned in this case with an injury resulting from a defect in the hull, engines or any of the ship's permanent fittings, but one which arose from an improper selection of a consumable supply.

The staging, as it was rigged at the time of the accident, cannot be considered a normal appliance of the ship. The phrase "keep in order" indicates that the objects contemplated were something more permanent than consumable supplies.

The staging consisted of ropes, pulleys, a plank and other rigging, all of which had to be assembled from the ship's general supplies. The mate in charge determined the amount and character of supplies which were to be used. Instead of using rope, the mate might well have directed the use of chains or wire cable.

The staging was not a permanent part of the ship; it was put up and taken down from time to time as occasion

required. Thus it was nothing more than a collection of various parts of the ship's supplies molded into a unit to be used temporarily to do a particular job.

The putting up of the staging so that the paint could be washed down was part of the ship's operating routine, and if it was not done properly, it was a matter of "operating negligence."

The negligence in this case was that of the mate in selecting a defective piece of rope when there was on board a sufficient quantity of good rope. In other words, there were adequate supplies, but they were not used.

Thus the situation in this case is analogous to that in *Roebling's Sons Co. of N. Y. v. Erickson, supra.*

There is a clear distinction between the furnishing of adequate supplies of a general character which may be used for a number of different purposes, and the furnishing and maintaining of other integral pieces of equipment which are put to definite uses. We believe that the rope which was used and which obviously falls in the former class, was therefore not within the scope of "appliances appurtenant to the ship".

It is not possible to repair and keep in order things which are being continuously used and worn out, such as rope. When that situation arises, it is the duty of the vessel to replace the used supplies with others. The seaworthiness of the vessel with respect to supplies during a voyage, therefore, depends upon having available on board sufficient quantities of such supplies. Both courts-below found that there was an adequate supply of good rope on board the vessel. (PR. 2, 6.)

It is significant that your Honorable Court in *The Osceola, supra*, did not specify "supplies" if they were intended to be included in the word "appliances". The pres-

ence of sufficient consumable supplies is necessarily included in the term "seaworthy".

The Defect in the Rope Used Was Latent and Not Ascertainable on Inspection.

Furthermore, even if it be assumed that it was such an appliance, the evidence in the case does not establish that the defect was known or one which ought to be known, even though the Trial Court found that the rope was "unquestionably rotten or defective at the point at which it broke." (PR. 2.) The mate and the boatswain examined the rope prior to its use and did not see any place where it was bad or rotten. (R. 221.) They tested it by twisting the rope counterwise. (R. 221.)

Seaworthiness is a relative term and is not synonymous with safety. As stated in *The Henry B. Fiske, supra* at page 190, the shipowner is only liable for having failed to use reasonable care and for defects which could have been discovered. See also *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951 (C. C. A. 2d, 1919).

After the vessel has been adequately supplied for the voyage there is no absolute continuing warranty on the part of the shipowner that all the supplies will at times during the voyage remain safe.

It is not disputed that there is an absolute duty upon the shipowner to make the vessel safe and seaworthy and properly equipped and supplied at the commencement of the voyage.

The cases, as we understand them, however, do not support the libellant's contention that there is an absolute continuing obligation at all times during the voyage on the part of the shipowner to keep all of the supplies safe.

The case of *Hough v. Texas and Pacific R. R. Co.*, 100 U. S. 213 (1879), is not applicable because it concerns common law rights of employees working on the shore and not the special maritime rights of a seaman to indemnity for injuries resulting from unseaworthiness of a vessel or for failure to provide proper maintenance and cure. Likewise, *The Noddleburn, supra, The Portland, supra,* and *The Julia Fowler, supra,* are not applicable for the reasons hereinbefore set forth on pages 12 and 13.

In *H. A. Scandrett*, 87 F. (2d) 708, (C. C. A. 2nd, 1937) one of the doors which the seaman had to use was stuck and when he pulled on the knob, it came loose causing him to fall. It was specifically found that at the commencement of the voyage the vessel was unseaworthy and that the unseaworthiness was due to the improper construction of the door and the defective condition of the lock thereon. Inasmuch as the unseaworthiness existed at the commencement of the voyage, it was properly held that the shipowner was liable. In that case the court was not concerned with a separate appliance such as a wrench or other type of hand tool. The defect was in a part of the ship's permanent fittings.

In *The Secandbee*, 103 F. (2d) 577, (C. C. A. 6th, 1939) the plaintiff was injured when he fell against the moving parts of a pump which was adjacent to a narrow passageway. The vessel at that point lacked a guard rail, the presence of which the court found would have prevented the accident. Here again the fault was in maintaining a continuous unsafe condition. This condition existed at the commencement of the voyage and was not the result of some act or operation during the course of it.

We think there is a distinction between the duty of making the vessel seaworthy in respect of her hull, machin-

ery, fittings, and working conditions, and the obligation to furnish adequate supplies.

An owner, having furnished adequate supplies at the commencement of the voyage, is not liable if injuries result from the failure to use them properly, to wit, the negligence of the mate in this case in selecting a defective piece of rope when there was on board a sufficient quantity of good rope.

We therefore submit that Mr. Justice McReynolds in *The Pinar Del Rio* correctly expressed the general maritime law when he said:

> "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." (Page 155.)

B. The Pinar Del Rio Has Not Been Overruled by the Case of Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424.

The Petitioner, arguing in the alternative, contends that if *Plamals v. SS. Pinar Del Rio, supra*, was the law, it has been overruled by the case of *Socony-Vacuum Oil Co. v. Smith, supra*.

This contention was properly dismissed by the Court below as follows:

> "The libellant urges also that this portion of the 'Pinar Del Rio' decision is no longer authority after the opinion of the majority of the Court in Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. The sole question in that case, however, was whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance, on the ship instead of a known safe

method of doing his work. All of the discussion in the opinion by Mr. Justice Stone is directed to this point. The decision was one under the Jones Act. *"We do not, as we read the opinion, find even a dictum to support the position of the libellant here."* (Italics ours.) (PR. 7.)

As above stated by Judge Goodrich, the decision in the *Socony-Vacuum Oil Co.* case was one under the Jones Act, and, as we read the decision, we too do not find "even a dictum to support the position" of the petitioner.

The case of *Plamals v. SS. Pinar Del Rio, supra*, is not mentioned in any of the briefs before Your Honorable Court in that case; nor is there any mention of it in Mr. Chief Justice Stone's opinion.

In *Socony-Vacuum Oil Co. v. Smith, supra*, the petitioner contended that assumption of risk was a defense in a proceeding under the Jones Act and that *The Arizona v. Anelich*, 298 U. S. 110 (1936) and *Beadle v. Spencer*, 298 U. S. 124 (1936) would not be modified by denying recovery. The petitioner was not successful, but Your Honorable Court in the *Socony-Vacuum Oil Co.* case sustained the respondent's contention that the petitioner not only had failed to prove a defense of voluntary assumption of risk but also that such was not a defense *in a suit brought under the Jones Act*, even though the seaman chose to use a defective *appliance* (as distinguished from supplies heretofore discussed in pages 13 to 17 *supra*) when the seaman knew it to be unsafe.

While *Olson v. Flavel, supra*, and *The Julia Fowler, supra*, are cited in the quotation from the *Socony-Vacuum Oil Co.* case appearing on page 15 of petitioner's brief, the attention of Your Honorable Court is called to the fact that these cases were therein cited on the question of assump-

tion of risk, and are not in point on the question here under review. *Olson v. Flavel, supra,* as above-stated, concerns the use of a defective appliance (a block) and not a consumable supply like a rope, while in the *Socony-Vacuum Oil Company* case at page 432, Your Honorable Court recognized that in *The Julia Fowler* the officer deliberately used "a halliard known to be defectively spliced".

The *Socony-Vacuum Oil* case instead of overruling *The Pinar Del Rio*, as contended by petitioner, brings into sharper relief the difference between the various rights which an injured seaman has.

As heretofore indicated, there is a marked difference between seaworthiness and negligence and between enforcement of rights under the general maritime law and under the Jones Act.

While the Jones Act is remedial and was enacted for the benefit of seamen, giving them rights which they would not overwise have had and while it permits proofs different from that under the general maritime law, the Jones Act also conditioned those rights on suit being instituted within a specified time.

In this case, while the Trial Court found that the petitioner was not guilty of laches in the proceeding under general maritime law as set forth in petitioner's Amended Libel (R. 20-24), it was conceded by petitioner's counsel that he was barred by the aforesaid limitation from pressing any claim under the Jones Act. Therefore, the petitioner, after exception by the respondent, withdrew all reference to the Jones Act in his original Libel, which was based on negligence, and amended the same to a cause of alleged unseaworthiness under the general maritime law.

If the petitioner had not allowed the statute of limitations in the Jones Act to run against him, undoubtedly he

would have continued his original action under the Jones Act and not attempted to establish a claim of unseaworthiness. The respondent should not now be penalized for the petitioner's tardiness so as to give petitioner under the general maritime law rights properly enforceable under the Jones Act.

The rights and liabilities under the general maritime law should be kept separate and distinct from those under the Jones Act, nor should a decision under the Jones Act be construed to overrule inferentially and without any reference thereto a specific holding of Your Honorable Court with reference to rights and liabilities under the general maritime law. Both the *Socony-Vacuum Oil Co.* case and *The Pinar Del Rio* are proper decisions in their own particular spheres of maritime jurisprudence, and neither adversely affects the other.

CONCLUSION.

We, therefore, submit *Plamals v. S.S. Pinar Del Rio* is still the law, is a sound decision and should not be overruled. The decree of the United States Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1943.

Anton Mahnich, Petitioner,
vs.
The Southern Steamship Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 31, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, a seaman on respondent's vessel, the "Wichita Falls", was injured, while at sea, by a fall from a staging, which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate when there was ample sound rope available for use in rigging the staging. The question is whether the defect in the staging was a breach of the warranty of seaworthiness rendering the owner liable to indemnify the seaman for his injury.

Petitioner brought this suit in personam in admiralty in the District Court for Eastern Pennsylvania, to recover indemnity and maintenance and cure. On the trial the evidence showed that the mate ordered petitioner to paint the bridge and to stand on the staging for that purpose. The staging consisted of a board supported at both ends by rope which, if sound, was sufficient in strength to sustain the stage and its load. The boatswain, by direction of the mate, had cut the rope for the staging from a coil, which had been stored for two years in the Lyle gun box. The rope, intended for use with the Lyle life-saving apparatus, had never been used. There was testimony that it had been examined and tested by the boatswain and the mate and that it was generally sound in appearance. After the accident, examination of the rope at the point where it broke showed that it was so rotten as to be inadequate to support the strain imposed upon it.

The trial judge concluded from the evidence that there was sound rope on board available for rigging the staging. He found that there was no fault in the manner in which the stage had been rigged, but that the rope selected by the mate was defective and that petitioner's injury was attributable to the negligence of the

boatswain and the mate in failing to observe the defect.[1] He held that the proceeding was brought too late to recover for the negligence under the Jones Act, and that the "Wichita Falls" was not unseaworthy by reason of the defective rope used in rigging the staging, citing *Plamals* v. *The Pinar Del Rio*, 277 U. S. 151, 155. He accordingly denied indemnity to petitioner, but gave judgment in his favor for maintenance and cure.

The Court of Appeals for the Third Circuit affirmed, 129 F. 2d 857, 135 F. 2d 602, by a divided court, resting its decision on the statement quoted from the opinion in *The Pinar Del Rio, supra*, 155, that "The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." We granted certiorari, 320 U. S. —, upon a petition which urged that the statement quoted from *The Pinar Del Rio, supra*, does not rule this case, and that the decision below is inconsistent with the decisions in *The Osceola*, 189 U. S. 158, and in *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424.

The sole issue presented by the petition for certiorari is that of respondent's liability to indemnify petitioner for the injury suffered by reason of the defective staging. No question is raised with respect to petitioner's right to recover under the Jones Act or his right to the award of maintenance and cure or its adequacy.

A finding of seaworthiness is usually a finding of fact. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 145; *Steel* v. *State Line S.S. Co.*, L. R. 3 A. C. 72, 81-82, 90-91. Ordinarily we do not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below. *The Carib Prince*, 170 U. S. 655, 658; *The Wildcroft*, 201 U. S. 378, 387; *Luckenbach* v. *McCahan Sugar Co., supra*; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 13; *Just v. Chambers*, 312 U. S. 383, 385. Here, however, both courts below, holding themselves bound by *The Pinar Del Rio, supra*, have, on the facts found, held as a matter of law that the staging was seaworthy despite its defect. That conclusion of law is reviewable here.

Until the enactment of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, the maritime law afforded no remedy by way of indemnity

[1] The dissenting judge in the Circuit Court of Appeals thought that this finding of negligence on the part of the ship's officers was erroneous. See 135 F. 2d 602, 605. There was no attack on this finding here, and we have not examined the correctness of the trial judge's conclusion, for, as we will point out, the question whether there was such negligence does not control decision of the issues of this case.

beyond maintenance and cure, for the injury to a seaman caused by the mere negligence of a ship's officer or member of the crew. But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola*, *supra*, 175. *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 380-381; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 258-260; *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130, 134; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 370-371; *Warner* v. *Goltra*, 293 U. S. 155, 158; *The Arizona* v. *Anelich*, 298 U. S. 110, 120 *et seq.*; *Socony-Vacuum Co.* v. *Smith*, *supra*, 428-429; *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 40. The latter rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in *The Osceola*, *supra*, by numerous decisions of the lower federal courts during the last century. See *The Arizona* v. *Anelich*, *supra*, 121, footnote 2.

This was a recognized departure from the rule of the English law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, *Couch* v. *Steel*, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, 39 & 40 Vict., Chap. 80, § 5, reenacted by the Merchant Shipping Act of 1894, 57 & 58 Vict., Chap. 60, § 458. By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof, an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage. See *Hedley* v. *Pinkney Steamship Co.*, [1894] A. C. 222.

In a number of cases in the federal courts, decided before *The Osceola*, *supra*, the right of the seaman to recover for injuries caused by unseaworthiness seems to have been rested on the negligent failure, usually by the seaman's officers or fellow seamen, to supply seaworthy appliances. *The Noddleburn*, 28 Fed. 855, aff'd, 30 Fed. 142; *The Neptuno*, 30 Fed. 925; *The Frank and Willie*, 45 Fed. 494; *The Julia Fowler*, 49 Fed. 277; *William Johnson & Co.* v. *Johansen*, 86 Fed. 886; and see *The Columbia*, 124 Fed. 745; *The Lyndhurst*, 149 Fed. 990. But later cases in this and other federal courts have followed the ruling of *The*

Osceola, supra, that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances.[2] *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260; *The Arizona* v. *Anelich, supra,* 120 *et seq.*; *Beadle* v. *Spencer,* 298 U. S. 124, 128-129; *Socony-Vacuum Co.* v. *Smith, supra,* 428-429, 432; *The H. A. Scandrett,* 87 F. 2d 708, 710-711; cf. *The Edwin I. Morrison,* 153 U. S. 199, 210.

If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness. It is true that before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew. But this is not sufficient to insulate the owner from liability for their negligent failure to furnish seaworthy appliances, see Judge Addison Brown, in *The Frank and Willie, supra,* 495-497; *Carlisle Packing Co.* v. *Sandanger, supra,* 259-260, more than their negligence relieves him from his liability for maintenance and cure. *The Osceola, supra,* 175; *Pacific Co.* v. *Peterson, supra,* 134; *Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, 527.

It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle.[3] That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seaman. The defense of the fellow servant rule to suits in admiralty for negligence, a defense precluded by the Jones Act, has never avowedly been deemed applicable to the owner's stricter obligation to the seaman of the warranty of seaworthiness.

The Osceola, supra, in answer to certified questions, laid down as separately numbered and independent propositions the rule of the owner's unqualified obligation to furnish seaworthy appliances, and the rule that the owner is not liable to a seaman for the negligence of his fellow servants. It nowhere intimated that the owner is relieved from liability for providing an unseaworthy appliance, merely because the unseaworthiness was attributable to the

[2] By statute the owner's similar obligation with respect to the carriage of goods is merely to exercise "due diligence to make the . . . vessel in all respects seaworthy". Harter Act, § 3, 27 Stat. 445, 46 U. S. C. § 192. See also Carriage of Goods by Sea Act, § 4(1), 49 Stat. 1210, 46 U. S. C. § 1304(1).

[3] See note 2, *supra.*

negligence of fellow servants of the injured seaman rather than to the negligence of the owner. Indeed, to support the rule of absolute liability, the Court, see *The Osceola, supra*, 173-175, relied on cases in which the vessel or its owner had been held liable for injuries resulting from unseaworthiness, although application of the fellow servant rule would have barred recovery. Of one, *The Frank and Willie, supra*, the Court, after pointing out that the seaman was injured by reason of the negligent failure of the mate to provide a safe place in which to work, said, "the question was really one of unseaworthiness and not of negligence."

The Court cited, discussed and relied upon *The Noddleburn, supra*, *Olson* v. *Flavel*, 34 Fed. 477, *The Frank and Willie, supra*, and *The Julia Fowler, supra*. In each the seaman was injured as a result of his use of unseaworthy appliances rendered so by the negligence of a fellow servant. In *The Julia Fowler, supra*, the injury was caused by a fall from a boatswain's chair which the Court found, as in this case, was rigged with defective rope by reason of the fault of the mate. The inapplicability of the fellow servant rule to this type of case was recognized explicitly in *The Noddleburn, supra*, 858, and in *The Frank and Willie, supra*, 495-497. And such was our holding in *Carlisle Packing Co.* v. *Sandanger, supra*, where it was said, at p. 259, "without regard to negligence the vessel was unseaworthy". See also the discussion in *The H. A. Scandrett, supra*, 710-711.

In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is nondelegable and not qualified by the fellow servant rule. *Hough* v. *Railway Co.*, 100 U. S. 213, 216-220; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647-648; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 386-388; *Union Pacific Ry. Co.* v. *Daniels*, 152 U. S. 684, 688-689. It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer.

The staging from which petitioner fell was an appliance appurtenant to the ship. It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used, because of the defective rope with which it was rigged. Its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable. Had it been adequate, petitioner would not have been injured and his injury was the proximate and immediate consequence of the unseaworthiness. See *The Osceola*, *supra*, 174-175, and cases cited. Any negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that purpose, could not relieve respondent of the duty to furnish a seaworthy staging. Whether petitioner knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. *The Arizona* v. *Anelich*, *supra*, 123-124; *Beadle* v. *Spencer*, *supra*, 129-130; *Socony-Vacuum Co.* v. *Smith*, *supra*.

Nor does the fact that there was sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one. We have often had occasion to emphasize the conditions of the seaman's employment, see *Socony-Vacuum Co.* v. *Smith*, *supra*, 430-431 and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done. For, as was said in *The Osceola*, *supra*, 175, the owner's obligation is "to supply and *keep in order* the proper appliances appurtenant to the ship." (Italics supplied.) It is not enough that the "Wichita Falls" had on board sound rope which could have been used to make the staging seaworthy, if in fact the staging was unsafe because sound rope was not used. *The Julia Fowler*, *supra*; *The Navarino*, 7 F. 2d 743, 746; cf. *The Portland*, 213 Fed. 699.

Respondent's argument that the defective rope was a consumable supply of the vessel, not falling within the requirement that the owner must furnish seaworthy equipment appurtenant to the vessel, is inappropriate here because, as we have said, it was the stage which was unseaworthy, by reason of the use of the defective rope in its construction. The stage was used in the repair of the ship, and was as intimately associated with it and with the seaman's employment as are the gangways or other appliances or the passageways used by the seaman in doing his work.

Moreover it would not be enough to say that this case concerns a consumable supply, for in *Carlisle Packing Co.* v. *Sandanger, supra*, the owner was held liable to a seaman for unseaworthiness, where a consumable supply of the ship was stored in such fashion as to render it dangerous to the seaman who used it. There gasoline had been negligently placed in a can marked "coal oil" and the seaman was burned by an explosion which resulted when he attempted to build a fire with the gasoline which he had taken out of the can thinking it to be coal oil.

The statement from *The Pinar Del Rio, supra*, relied upon by the two courts below, could be taken to support their decision, only on the assumption either that the presence of sound rope on the "Wichita Falls" afforded an excuse for the failure to provide a safe staging, or that antecedent negligence of the mate in directing the use of the defective rope relieved the owner from liability for furnishing the appliance thereby rendered unseaworthy. But as we have seen, neither assumption is tenable in the light of our decisions before and since *The Pinar Del Rio, supra*. So far as this statement supports these assumptions, it is disapproved. We cannot follow it, and also follow *The Osceola, supra*, the cases which it approved and *Carlisle Packing Co.* v. *Sandanger, supra*. We prefer to follow the latter as the more consonant with principle and authority.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1943.

Anton Mahnich, Petitioner,
vs.
The Southern Steamship Company.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 31, 1944.]

Mr. Justice Roberts.

I think the judgment is wrong. The case does not present a situation calling for liberalizing the maritime law in favor of seamen by abolishing the defense of a fellow seaman's negligence. Congress did that in 1920 (41 Stat. 1007). But it required actions in such situations to be brought within two years, which it subsequently extended to three years. The sole question is whether recovery should be permitted beyond the time when Congress said action must be instituted. I should say nothing further on this question save that the method of reaching the decision seems to me contrary to right exercise of the judicial function.

The petitioner has undoubtedly obtained care and cure to which, as a seaman, he was entitled irrespective of fault on the part of owner or master. He failed timely to avail himself of his right to sue under § 33 of the Jones Act. In an action under that statute the defense of the negligence of a fellow servant would not have been open to the respondent. In an effort to obtain damages, he brought this action under the general maritime law. His recovery *vel non* under the unusual circumstances can be of little importance to others than himself and the respondent. But, in order to give him the demanded relief, the court resorts to nullification of an earlier decision: *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, indistinguishable in fact and law, which has stood unquestioned for sixteen years, and applied principles settled years before in *The Osceola*, 189 U. S. 158.

The history of *Plamals* v. *Pinar Del Rio* is important. The libellant, a seaman on a British ship lying in United States waters, was ordered by a mate to repair a stack. A sling was used, for which the mate selected a piece of rope. The rope broke and the

seaman was injured. He filed a libel *in rem* against the vessel. The owner gave bond and released the ship.

The libel, after reciting the facts, alleged that the injuries were due "to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn, and not suitable for use." The libel failed to refer to § 33 of the Jones Act, but, at the trial, the libellant's proctor stated that he relied upon it. The claimant in its answer asserted that the vessel was of British registry and, as the only redress open to the libellant was under the British Workmen's Compensation Law, the Admiralty Court should decline jurisdiction. The claimant amended its answer to deny liability on the ground that the ship was provided with proper tackle but, through the negligence of an officer, bad tackle was selected.

The District Court held that the British law,—the law of the flag,—afforded no action *in rem* nor any action for indemnity since there was an ample supply of good rope on board and the mate chose an insufficient rope for use.

On appeal the Circuit Court of Appeals held that the libellant's pleadings were inadequate but, as no point had been made of their infirmity, went on to consider "whether, on the facts proven and under any applicable law, libelant has a case."[1] It said the libellant must make out a case of maritime tort; that, under the law of England, there could be no recovery and that if the applicable law were the maritime law of the United States the libellant could not recover for the improvident or negligent act of the mate, adding: "If the vessel had been unsupplied with good and proper rope, a different question would arise."

That court further held that, although, under the Jones Act, libellant could have sued at law or filed a libel, *in personam*, the statute gave no right to a libel *in rem*. The decree dismissing the libel was, therefore, affirmed.

Petitioner sought review in this court and, in his petition and briefs, asserted the right to maintain a libel *in rem* under the Jones Act but, in the alternative, insisted that, under the general maritime law, independent of the Jones Act, the libellant was entitled to recover for the failure to supply, and keep in order, proper appliances, properly rigged, and for the unseaworthiness of the vessel in this respect.

It will be noted how closely that case parallels the instant one. In both, though for differing reasons, the libellant was precluded

[1] 16 F. 2d 984, 985.

from relying on the Jones Act which would have avoided all question of a fellow servant's negligence. In both, the libellant then sought to resort to his claim for indemnity for a maritime tort. In the *Pinar Del Rio* case it was held that he had made no case on the latter theory, and in the present case it is held that he has made out such a case. This court, in the earlier case, held two things: first, that a libel *in rem* cannot be maintained under the Jones Act, and, second, that, if the case were treated as the Circuit Court of Appeals had treated it,—as one for recovery of indemnity for a maritime tort,—the record would not support the claim. The court said:

"*The record does not support the suggestion that the 'Pinar Del Rio' was unseaworthy. The mate selected a bad rope when good ones were available.*

"We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based upon that section. *The evidence would not support a recovery upon any other ground.*" (Italics added.)

These holdings were made in answer to extended argument in the briefs, the petitioner on the one hand contending that the vessel should be treated as an American vessel and as being unseaworthy, respondent contending that, whether British or American, she was not unseaworthy under the law of either nation and that the libellant's injuries were due to the negligence of a fellow servant. What the court said, therefore, was clearly responsive to the contentions of the parties. The present decision does not merely disapprove language used in the earlier case. It overrules the case and alters long-established law without adequate reason.

There has been some suggestion that the holding in the *Pinar Del Rio* case to which I have referred crept into the opinion by inadvertence. But I cannot assume any such thing in view of the proverbial care which all the justices exercise to prevent expression of opinion on questions not necessary to the decision of a case. The decision must be taken at face value as the expression of the views of all the members of the court.

Cases now cited in the opinion of the court were cited and considered by the court in the *Pinar Del Rio* case.[2] The most im-

[2] The Julia Fowler, 49 Fed. 277; The Noddleburn, 28 Fed. 855; The Osceola, 189 U. S. 158; The Navarino, 7 F. 2d 743. The Portland, 213 Fed. 699, not cited, was, however, decided prior to this court's decision in the Pinar Del Rio case.

portant of them, and one on which the Circuit Court of Appeals relied in that case, was *The Osceola*, *supra*.[3] The instant decision not only overrules the *Pinar Del Rio* case but asserts that it is inconsistent with the holdings in *The Osceola*. If this be true it must be because the court has a different conception of the word consequence than that I have.

In *The Osceola* this court, after the fullest consideration, recapitulated the admiralty law respecting the rights of injured seamen, *inter alia*, as follows (p. 175):

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen *in consequence* of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." . . . (Italics supplied.)

"That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure."

Unseaworthiness in the abstract does not afford a cause of action. An injury must be "in consequence" of the unseaworthiness,—must be connected with and result from it. And "unseaworthiness" covers a variety of situations variously affecting the work and risks of seamen. Unseaworthiness of the kind on which the court bases its opinion is very different from that due to a faulty mechanism which is an inherent risk to life and limb. If the doctrine now announced is right, a vessel supplied with the newest charts would be unseaworthy if the owner failed to remove old charts from the pilot house; it would make the owner an insurer that, no matter how many adequate facilities were at hand, no insufficient one was anywhere on the ship. Here the so-called unseaworthiness did not consist in want of adequate ropes for the seaman's need. His injury was due entirely to the negligent selection by the mate of a piece of bad rope when ample good rope was at hand. The district court found that the mate was negligent, the Circuit Court of Appeals accepted the finding, and the disposition of the case in this court is on the assumption of the correctness of this finding.

The question, therefore, is whether the ship is liable for the mate's negligent choice of a defective piece of rope when there was plenty of good rope aboard. Under the principles announced in

[3] The Osceola has long been recognized as a leading case. It has been cited for the propositions it laid down at least eighteen times by this court, and nearly two hundred times by lower federal courts.

The Osceola, recovery in admiralty for a maritime tort is barred by the mate's negligence. It was to avoid the interposition of such a defense of a fellow servant's act that the Jones Act made the Federal Employers' Liability Act applicable to the claims of injured seamen.

The court professes to have to choose between the doctrine it reads into the decision in *The Osceola* case and the ruling in *Pinar Del Rio*. But further it asserts that *Pinar Del Rio* is in conflict with *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, an opinion written by the same justice who wrote the opinion in the *Pinar Del Rio* case. The cited authority, as I read it, clearly ruled that in order for a seaman to recover for an injury where the ship is unseaworthy the unseaworthiness must be the direct cause of his injury.

That was an action brought in a state court by an injured seaman against the owner of a motor boat. When the boat left on her voyage a can intended for the use of the crew, supposed to contain coal oil, and so labeled, had been filled with gasoline and the seaman, without notice of this fact, attempted to use the contents and was burned. The supply of life preservers was insufficient and his injuries were aggravated by his having to search for one before he could jump overboard and extinguish the flames consuming his clothing. A verdict and judgment for the seaman was sustained. This court found that erroneous instructions had been given the jury but held the error harmless since the record showed that, without regard to the owner's negligence, the vessel was unseaworthy when she left the dock, and the court held (p. 59): "... if thus unseaworthy and one of the crew received damage *as the direct result thereof*, he was entitled to recover compensatory damages." (Italics supplied.) The court cited, amongst other cases, *The Osceola*.

I am at a loss to understand the citation of this case as authority for the present decision. The reasoning of the court's opinion seems to be this: In the *Carlisle Packing Co.* case recovery was permitted because the injury was the direct result of unseaworthiness. That decision, therefore, requires that the owner be held liable in the instant case although the seaman's injury was not the direct result of unseaworthiness, but of the mate's negligence. It must be upon the basis of such reasoning that the *Pinar Del Rio* case is overruled and the judgment below reversed.

There is some suggestion that the *Pinar Del Rio* case was overruled by *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424. It need only be said that the *Pinar Del Rio* case was not cited in the briefs of counsel in the *Socony* case nor referred to in the opinion and that in fact the *Socony* decision involved and purported to deal only with the general doctrine of assumption of risk and not with the defense of fellow servant's negligence. That the defenses are not the same is made plain by the fact that it has always been held that a fellow servant's negligence is no defense in actions brought under the Federal Employers' Liability Act,[4] whereas assumption of other risks was a defense[5] until Congress recently explicitly acted to abolish it as such.[6]

Indeed, if in the *Socony case*, the suit had involved a fellow servant's negligence instead of the seaman's assumption of the risk involved in the use of an unsafe appliance supplied by the vessel, the case would have been so plainly ruled by earlier decisions[7] that it would have merited no consideration, much less an opinion, by this court.

The statement in the opinion that the defense of a fellow servant's negligence had never been deemed applicable to the owner's obligation to the seaman under the warranty of seaworthiness ignores the point that if the seaman is to recover the unseaworthiness must, under the authorities cited, be the direct cause of the injury. If it is not, but a fellow servant's negligence is the cause, the seaman could not recover,[8] until the law was altered by the Jones Act.

The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles

[4] Illinois C. R. R. Co. v. Skaggs, 240 U. S. 66.

[5] Seaboard Air Line v. Horton, 233 U. S. 492.

[6] Act of Aug. 11, 1939, 53 Stat. 1404.

[7] Jamison v. Encarnacion, 281 U. S. 635; Uravic v. Jarka Co., 282 U. S. 234.

[8] Chelentis v. Luckenbach S.S. Co., 247 U. S. 372; The Rosalie Mahony, 218 Fed. 695; Re Tonawanda Iron & Steel Co., 234 Fed. 198; Payne v. Jacksonville Forwarding Co., 280 Fed. 150; The Daisy, 282 Fed. 261; Wood v. Davis, 290 Fed. 1; Hammond Lumber Co. v. Sandin, 17 F. 2d 760; Benedict Admiralty, 6 Ed., Vol. 1, p. 256.

them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.

Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case. The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes on the same question when another case comes before the court.[9] This might, to some extent, obviate the predicament in which the lower courts, the bar, and the public find themselves.

Mr. Justice FRANKFURTER joins in this opinion.

[9] See Minersville School District v. Gobitis, 310 U. S. 586; Jones v. Opelika, 316 U. S. 584, 623; Barnette v. West Virginia State Board of Education, 47 F. Supp. 251, 252-3; West Virginia State Board of Education v. Barnette, 319 U. S. 624.